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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 265

NORTH AMERICAN COMPANY, A CORPORATION,
Appellant,

vs.

WILLIAM K. KOERNER, JUDGE OF THE CIRCUIT COURT, CITY OF ST. LOUIS,
Appellee.

STATEMENT AS TO JURISDICTION

Pursuant to Supreme Court Rule 12, paragraph 1, the North American Company, the above appellant, files this its statement particularly disclosing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

I

The Statute Sustaining Jurisdiction

The statutory provisions sustaining the jurisdiction of this appeal by the Supreme Court of the United States are contained in Section 237 (a) of the United States Judi-

cial Code, as amended by the Act of January 31, 1928; 28 U. S. C. A. 344 (a).

II

The statute of the State of Missouri, the validity of which is involved, is Section 13 of the Uniform Stock Transfer Act of Missouri (Missouri Laws 1943, pp. 495, 499-500). Said Section 13 is set forth in full in Paragraph V hereafter, and said Missouri Uniform Stock Transfer Act is set forth in Appendix A hereto.

III

The judgment appealed from was entered on the 27th day of May, 1948, as appears by the certified copy of the judgment entry hereto attached and marked "Exhibit B".

IV

The application for an appeal was presented and allowed on the 5th day of August, 1948, as appears by certified copy of the order hereto attached and marked "Exhibit C."

V

Nature of the Case and Rulings Below

STATEMENT OF THE CASE

In November, 1943, one Frank J. Boehm instituted three law actions in the Circuit Court of the City of St. Louis against appellant and other parties defendant, in which he seeks to recover aggregate damages in the sum of $24,500,000 for alleged defamation of character.

Appellant was and is a non-resident of the State of Missouri and as against it in each of the three actions Boehm sued out an original attachment based on an affidavit of the non-residence of the appellant and caused the same to

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be levied upon shares of stock of the Union Electric Company of Missouri, a corporation organized and existing under the laws of Missouri, without actually seizing certificates representing the shares.

In each of the three actions the procedural steps are identical, and the sole general question at issue is whether or not the Circuit Court acquired jurisdiction of any property of the appellant by the writ of attachment issued and served as herein below more specifically set forth, and the decision of said general question will specifically turn upon the decision of the question as to whether or not the Missouri Uniform Transfer Act as construed by the Supreme Court of Missouri, and as applied in this case, deprives the appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the seizure authorized by the statute is insufficient to confer jurisdiction over the attachable res.

Missouri Statutes Involved

A

For over half a century prior to 1943 the only authority in Missouri for attaching shares of stock of a corporation was three sections of the Revised Statutes of Missouri of 1939. Those three sections are as follows:

> "Sec. 1457. Shares of stock subject to attachment. Shares of stock in any bank, association, joint stock company or corporation, belonging to any defendant in any writ of attachment, may be attached in the same manner as the same may be levied upon under execution.
>
> "Sec. 1345. Officers of corporation to furnish sheriff, etc., with certificate of shares, etc. When an execution shall be issued against any person, being the owner of any shares or stock in any bank, insurance company or other corporation, it shall be the duty of the cashier,

secretary or chief clerk of such bank, insurance company or other corporation, upon the request of the officer having such execution, to furnish him with a certificate, under his hand, stating the number of rights or shares the defendant holds in the stock of such bank, company or corporation, with the encumbrance thereon.

"Sec. 1346. Execution, how levied in such cases. The officer upon obtaining such information, or in any other manner, may make a levy of such execution on such rights or shares by leaving a true copy of such writ with the cashier, secretary or chief clerk; and if there be no such officer, then with some officer of such bank, association, joint stock company or corporation, with an attested certificate by the officer making the levy that he levies upon and takes such rights and shares to satisfy such execution."

Prior to 1943 the Supreme Court of Missouri had several times construed and applied the foregoing statutes and had ruled that such statutes are predicated upon the common law concept and definition of the property right in shares of stock as being an intangible interest deemed to be held by the issuing corporation: the certificate is not the stock; title can be transferred only on the books of the corporation (*Foster* v. *Potter,* 37 Mo. 525, 530-1; *Armour Bros. Banking Co.* v. *St. Louis National Bank,* 113 Mo. 12, 20; *Tufts* v. *Volkening,* 122 Mo. 631; *Richardson* v. *Busch,* 198 Mo. 174).

B

In 1943 the Legislature of Missouri enacted the Uniform Stock Transfer Act (Laws of Missouri for 1943, pp. 495, et seq.). Section 1 of said Uniform Stock Transfer Act as enacted is as follows:

"Section 1. How title to certificate and to shares represented thereby can be transferred. Title to a certificate and to the shares represented thereby can be transferred only,

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"(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

"(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person, or

"(c) By delivery of the certificate with an assignment endorsed thereon or in a separate instrument signed by the trustee in bankruptcy, receiver, guardian, executor, administrator or other person duly authorized by law to transfer the certificate on behalf of the person appearing by the certificate to be the owner of the shares represented thereby.

"The provisions of this section shall be applicable although the charter of articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

Section 13 of the Uniform Stock Transfer Act as recommended for adoption by the Commissioners of Uniform Laws (Vol. 6, Uniform Laws Annotated, pp. 17-18, Edward Thompson Company 1922), reads as follows:

"No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy or be surrendered to the corporation which issued it or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it."

The House of Representatives of the Missouri Legislature approved and adopted Section 13 as recommended by the Commissioners of Uniform Laws set out above.

But the Missouri Senate, by an amendment, struck out the section as passed by the House and adopted an amended section, pursuant to which the "remedies provided by Sections 1345 and 1346" Revised Statutes of Missouri for 1939 are amended and re-enacted.

Section 13 as so amended and adopted reads as follows:

> "Section 13. Attachment or execution against shares of stock shall be valid, when. In addition to the remedies provided by Sections 1345 and 1346 and related sections of the Revised Statutes of Missouri 1939 providing for attachment or execution upon shares of stock, attachment or execution against shares of stock for which a certificate is outstanding shall be valid when such certificate is actually seized by the officer levying the attachment or execution against other personal property; *provided*, that a levy of attachment or execution resulting in actual seizure of such certificate shall take precedence over all other remedies provided by law when made at substantially the same time as such other levy, and prompt notice thereof given to the corporation issuing such shares. In case of levy under said Sections 1345 and 1346 of the Revised Statutes of Missouri 1939, the innocent holder for value and without notice of any certificate of shares of stock subject to such levy may, in addition to the assertion of claim as now provided for under Section 1348 of said statutes, notify the corporation issuing such shares that he has acquired rights to the certificate therefor, and in the event that such notice shall be so given prior to actual sale of said shares of stock under execution, it shall be the duty of the corporation to forthwith notify the officer making the levy or attachment, of the assertion of such adverse claim and such notice to such officer shall act as a stay of further proceedings in connection with such attachment or levy, and it shall thereupon be the duty of the party assert-

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ing such claim to promptly obtain an adjudication of the rights of the parties. Until such rights are adjudicated the corporation shall not be compelled to issue a new certificate for such shares of stock until the old certificate is surrendered to it."

Section 19 of the Transfer Act as adopted reads as follows:

"This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."

THE ATTACHMENT PROCEDURE SHOWN IN THE RECORD

The plaintiff, Boehm, in each of the three actions proceeded under the purported authority of Sections 1345 and 1346 Revised Statutes of Missouri for 1939 as amended and re-enacted by Section 13 of the Uniform Stock Transfer Act (Laws of Missouri 1943 pp. 495 et seq.) In each case the procedure was as follows:

The writ of attachment was issued May 13, 1946. On May 13, 1946, the Sheriff of the City of St. Louis notified the Secretary of the Union Electric Company of Missouri in writing that an attachment had issued out of the Circuit Court and requested said Secretary to furnish the Sheriff with a certificate under the Secretary's hand stating the number of rights or shares the appellant, North American Company, holds in the stock of the said Union Electric Company with encumbrance thereon, for the purpose of enabling said Sheriff to levy such attachment on such rights or shares in accordance with law; that such information was authorized by virtue of Sections 1345 and 1457, R. S. Mo. 1939. To said notice was attached a certified copy of the writ of attachment.

On May 17, 1946, in response to said request for a certificate, Eugene J. Shapiro, Secretary of the Union Electric Company of Missouri, delivered to said Sheriff a certificate

under the hand of said Eugene J. Shapiro, Secretary of the Union Electric Company of Missouri, stating that it appeared by the stock books and records that before said attachment was issued, and before said request was made, said Union Electric Company of Missouri, by its duly chosen officers, had issued and delivered certain certificates of ownership representing in the aggregate 2,694,991 shares of its common stock to the said North American Company at its office in New York City; that each of said certificates is transferable on endorsement; that said certificates representing the aforesaid number of shares were at the date of said request for a certificate and still were outstanding and were registered on the books of said Union Electric Company of Missouri in the name of the said North American Company, but whether said certificates, in whole or in part, were at the date of service of said request for a certificate held by the North American Company, the undersigned did not know, and the records of said Union Electric Company did not show, and whether or not the certificates representing the aforesaid shares on any part thereof were encumbered, and if so, to what extent, the undersigned did not know, and the books of the said Union Electric Company did not show.

On May 29, 1946, said Sheriff purported to levy on said shares of stock by serving the Union Electric Company with the notice following signed by said Sheriff:

> "To Union Electric Company of Missouri:
>
> By virtue of the writ of attachment herewith, I hereby levy upon, seize and attach all of the rights, title, claim and interest of the North American Company, a corporation, of, in and to 2,694,991 shares of the capital stock of Union Electric Company of Missouri, a corporation."

On June 10, 1946, said Sheriff filed his return to said writ of attachment and therein recited that he had executed the

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same in the manner set forth above, and the Sheriff attached to his return and made a part thereof the aforesaid certificate made and signed by Eugene J. Shapiro, Secretary of the Union Electric Company of Missouri.

Appellant's Motion to Quash the Return of the Sheriff to Said Writ of Attachment

Before the return day of process served upon appellant in New York City, the appellant entered a special appearance in the Circuit Court and filed therein a motion to quash the return of the Sheriff of the City of St. Louis to said writ of attachment.

Two specifications of said motion are as follows:

"Because it appears by the recitals of the Sheriff's return that there has been no seizure by the Sheriff of the certificates of any shares of stock of the Union Electric Company of Missouri owned by The North American Company but, contrarily, it appears, by the recitals of said return, that before the Sheriff made demand upon the Secretary of the Union Electric Company for a certificate of ownership and before he purported to levy said writ, the Union Electric Company of Missouri had executed and delivered to The North American Company, at its offices in New York City, certificates representing the ownership and beneficial interests in all those shares of its stock owned by The North American Company; without such seizure of said certificates of stock there can be no valid attachment of such shares as the property of The North American Company and the Court's assumption of jurisdiction and control of The North American Company's property situated, held and owned outside of the State of Missouri, is without warrant or authority of law and in excess of the jurisdiction of the Court and constitutes a violation of the rights and immunities of the said North American Company as secured to it by the Fourteenth Amendment to the Constitution of the

United States, Section 1, and said attempted attachment is wholly null and void.

"Because the court has no authority or power to authorize an attachment of property of The North American Company, being a non-resident, except that such property be situated in this State (R. S. Section 895); and it affirmatively appears from the facts recited in the Sheriff's return to the writ of attachment and from the provisions of section 1 of the Uniform Stock Transfer Act, that the shares of stock sought to be attached were and are outside the State of Missouri and not within the territorial jurisdiction of this court and the assumption of control and disposition of said shares of stock is without warrant or authority of law and in excess of the jurisdiction of the court and constitutes a violation of the rights and immunities of the said North American Company as secured to it by the Fourteenth Amendment to the Constitution of the United States and said attempted attachment is wholly null and void."

On August 18, 1947, the Circuit Court overruled said motion and in so doing, on behalf of the attachment plaintiff, gave a declaration of law which concluded with the statement following:

"The court further finds and declares that the shares of stock so levied upon are located and situated in this State for the purpose of attachment and levy upon the right, title and interest of said North American Company therein, notwithstanding the fact that certificates representing said shares have not been seized by the Sheriff under said writ of attachment."

Supreme Court of Missouri Issues an Alternative Writ of Prohibition

On or about the 27th day of August, 1947, the appellant in each of the actions made application to the Supreme Court of Missouri for a writ of prohibition to prohibit the Circuit Court of the City of St. Louis from proceeding

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further in connection with said writ of attachment. In each of the actions one of the grounds stated in appellant's application for a writ of prohibition is as follows:

> "It appears from the face of the record that the certificates representing the shares and carrying the legal title (and not 'a merely equitable or beneficial ownership') were and are situated and held outside the State of Missouri. Respondent has erroneously and without jurisdiction attempted to assume control and power of disposition over relator's property situated outside the State in violation of relator's rights and immunities as secured to it by the due process clause of the Fourteenth Amendment to the Constitution of the United States."

On the 12th day of October, 1947, the Supreme Court of Missouri in each of said actions issued its preliminary or alternative writ of prohibition and entered an order consolidating said causes of action and docketing the consolidated cause for hearing before the full court comprised of seven Judges.

The rules of the Supreme Court of Missouri do not prescribe assignments of error *eo nominee*. However, Rule 1.25 provides that in the instance of a grant of an original writ "printed briefs shall be filed in all respects as is required on appeals". And Rule 1.08, stating the requirements of printed briefs, provides that such brief shall contain: "The points relied on which shall specify the allegations of error with citation of authorities thereunder."

In compliance with said rule appellant here (relator in the application for a writ of prohibition) in its printed brief set forth "Point 1", as follows:

> "Under provisions of the Uniform Stock Transfer Act, the right of property in the shares, the title to the shares, is embodied in the certificates representing such shares. Such title and possession of the certificates is

one and inseparable. Since such certificates were and are beyond the territorial jurisdiction of the court, the attempted attachment is an obvious abuse of power and an assumption of jurisdiction over property held and owned in New York and thereby is a violation of relator's rights as secured to it by the due process clause of the Fourteenth Amendment to the Constitution of the United States. Pennoyer *v.* Neff, 95 U. S. 714, 723; State ex rel. *v.* Barnett, 245 Mo. 99, 120-1."

By printed brief and oral argument appellant urged that the positive substantive provisions of the Uniform Stock Transfer Act merged the title to the shares in the certificates representing the same and thereby abrogated every feature and character of the common law property right in shares of stock, which is the sole subject matter of the attachment remedy formerly afforded by R. S., Sections 1345 and 1346, *supra;* that the substantive provisions of the Transfer Act legislated out of existence the jurisdictional subject matter of said sections; that Section 13 of the Transfer Act as amended is in conflict with the substantive provisions of the Act, in that it purports to treat shares of stock for purposes of attachment both (1) as negotiable under the Transfer Act and (2) as non-negotiable under the common law; that the jurisdictional, attachable res was both (1) the certificate representing the shares, wherever it might be, and (2) the intangible common law interest held by the issuing corporation.

Appellant further urged that the Uniform Stock Transfer Act should be interpreted and construed in accordance with the legislative command set forth in Section 19, *supra.* And in this connection appellant invoked *Commercial Bank* v. *Canal Bank,* 239 U. S. 520, 528-9, where this Court construed and applied an identical provision in the Uniform Warehouse and Receipts Act of Louisiana.

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Decision of the Supreme Court of Missouri

The Court Discharged the Alternative Writ of Prohibition

In its opinion the Supreme Court of Missouri said:

"Relator, making special appearances, moved to quash the Sheriff's returns. The grounds stated in the motions are lengthy, but may be resolved into the single issue whether the stock had a situs in Missouri so that jurisdiction of the Circuit Court could be obtained by attachment without violating relator's rights to due process under the Fourteenth Amendment.

• • • • • • •

"Relator, while conceding that the situs of the shares of stock was in Missouri prior to the adoption of the Transfer Act, contends that the nature of the property in shares of stock has been entirely changed by the Transfer Act; that the shares of stock are the certificate itself and have become tangible personal property; that stock certificates are negotiable instruments with a situs no longer at the domicile of the corporation but having a situs solely where the certificates themselves are located; that even though the Transfer Act expressly retains the right to attach under the old statutes, this provision of the act is so much in conflict with the remainder of the act that it must be disregarded.

"On the contrary we agree with the views of the learned trial judge who in upholding the attachment in the three cases filed a memorandum opinion which states in part as follows: 'The act of 1943 does not change the substantive law with reference to the relationship between corporation and stockholder. It is still a contractual and trust relationship, an intangible; the certificate merely evidences it. This 1943 act purports to regulate the "endorsement, transfer and delivery of shares of stock in corporations"; and it does

just that, nothing more. If it were to be construed to alter the pre-existing property rights of the stockholders it might be challenged on constitutional grounds. So far as this Court can discern, neither expressly nor by implication does the act do more than provide how stock may be transferred, both voluntarily and by legal procedure, and one of the methods which may legally be followed is set forth in Section 13 (of the Act) reaffirming Sections 1345 and 1346, R. S. Mo. 1939.'

"Giving full effect to Section 13 does not destroy the balance of the act, which can be given a useful and substantial scope without changing the situs of the shares.

• • • • • • •

"It appears to us that one of the purposes of the Transfer Act was to provide better protection to a purchaser in good faith of a duly endorsed stock certificate or a certificate accompanied by a properly executed stock power. This purpose is accomplished through a number of provisions contained in the act as adopted one of which, Section 7, has been heretofore discussed. The legislature could thus facilitate the use of a stock certificate as an evidence of title without destroying the situs of the shares in Missouri and the jurisdiction of Missouri courts to attach the shares under the pre-existing attachment statutes. Section 13 although clearly out of harmony with the evident intent of the framers of the model act is not so contradictory as to destroy the remainder of the Transfer Act as adopted by our legislature.

• • • • • • •

"Relator urges that Section 13 of the Transfer Act as adopted creates the possibility of two certificates being outstanding representing the same stock, which would create an unconstitutional fictitious increase in stock in violation of Section 7, Article XI, 1945 Constitution, citing *Berry* v.

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Rood, 168 Mo. 316, 67 S. W. 644, construing a similar provision of the 1875 Constitution. We do not agree. Such a situation would be analogous to two conflicting chains of title to a tract of real estate, one perhaps commenced by a Sheriff's deed. The courts would ultimately have to determine which chain of title is superior. A similar determination would have to be ultimately made as to the conflicting claims of the holders of two different certificates purporting to represent the same shares of stock.

"Relator has raised some constitutional points that we do not believe are involved in this case and not properly before us for determination, so we will not discuss them."

The said opinion of the Supreme Court of Missouri is set forth in Appendix D hereto.

The Missouri Supreme court in thus construing the Uniform Transfer Act of that State has held:

1. That the Act, by Section 13, authorizes an attachment of shares by actual seizure of the certificate representing the same in accordance with the provisions of Section 1 of the Act *without reference to the book entries of the issuing corporation.*

2. That the Act, by Section 13, also authorizes an attachment of stock by notice to the issuing corporation without seizure of the certificate in accordance with R. S. Sections 1345 and 1346 as amended *without reference to the ownership or whereabouts of the certificates representing the shares.*

3. That the Act also authorizes transfer of the stock by endorsement and delivery of the certificate to an innocent purchaser for value, even after the attempted attachment.

4. That the Act provides that:

"In case of levy under said Sections 1345 and 1346 of the Revised Statutes of Missouri, 1939, the innocent

holder for value and without notice of any certificate of shares of stock subject to such levy may, in addition to the assertion of claim as now provided for under Section 1348 of said statutes, notify the corporation issuing such shares that he has acquired rights to the certificate therefor, and in the event that such notice shall be so given prior to actual sale of said shares of stock under execution, it shall be the duty of the corporation to forthwith notify the officer making the levy or attachment, of the assertion of such adverse claim and such notice to such officer shall act as a stay of further proceedings in connection with such attachment or levy, and it shall thereupon be the duty of the party asserting such claim to promptly obtain an adjudication of the rights of the parties. Until such rights are adjudicated the corporation shall not be compelled to issue a new certificate for such shares of stock until the old certificate is surrendered to it."

5. That the provisions quoted in 4 "although clearly out of harmony with the evident intent of the framers of the model act" are valid provisions thereof.

The inescapable result of such construction is that the attempted attachment without seizure of the certificate is insufficient to invest the court with either the power of continuous custody or the power of disposition over the stock because the attachment debtor is by the statute left free to transfer the certificate to an innocent purchaser for value and thereby stay the levy and put an end to the attachment.

The statute as thus construed and applied authorizes a form of seizure short of jurisdiction over the attachable res and thereby takes the property of the appellant without due process of law, in violation of the Fourteenth Amendment.

The appellant could not have anticipated this interpretation and construction of the Transfer Act in thus upholding and giving effect to the two irreconcilable and conflicting methods of transferring stock by operation of law, and

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the Federal question produced by said unanticipated construction was specifically raised and stated in appellant's petition for rehearing, which was the first opportunity it had for raising said Federal question.

PETITION FOR REHEARING

Within the period allowed by the rule of the Supreme Court of Missouri, appellant filed a petition for a rehearing. The second specification of the petition for a rehearing is as follows:

> "Section 1 of the Uniform Stock Transfer Act embodies the title, the entire legal and beneficial interest and right in the shares in the certificates representing the same, which certificates are held outside the State and beyond the jurisdiction of the court.
>
> "Section 13 of the Uniform Stock Transfer Act as construed by the court recognizes that the possession, custody and control of the certificates representing said shares is beyond the custody, control and power of disposition of the attaching officer and is altogether within the uncontrollable power of disposition of the holder. The purported lien of the attempted seizure under Section 13 is unreal, hypothetical and contingent, and its attempted enforcement is defeasible at the will of the holder of the certificates. Such purported attachment by notice to the issuing corporation does not result in such effective control of the shares as affords a basis for the assumption and exercise of jurisdiction. And the Circuit Court's attempted assumption of jurisdiction over said shares under the facts and circumstances shown on the record is a violation of the relator's rights as secured to it by the due process clause of the Fourteenth Amendment to the Constitution of the United States."

On May 27, 1948, the Missouri Supreme Court, without more, overruled said petition.

From the foregoing, it is clear that there is drawn in question the validity of that portion of Section 13 of the Uniform Transfer Act of Missouri which provides for attachment of shares of corporate stock under the remedies provided by Sections 1345 and 1346 and related sections of the Revised Statutes of Missouri, 1939, and the further provision of said Section 13, to wit:

> "In case of levy under said Sections 1345 and 1346 of the Revised Statutes of Missouri, 1939, the innocent holder for value and without notice of any certificate of shares of stock subject to such levy may, in addition to the assertion of claim as now provided for under Section 1348 of said statutes, notify the corporation issuing such shares that he has acquired rights to the certificate therefor, and in the event that such notice shall be so given prior to actual sale of said shares of stock under execution, it shall be the duty of the corporation to forthwith notify the officer making the attachment of the assertion of such adverse claim and such notice to such officer shall act as a stay of further proceedings in connection with such attachment or levy, and it shall thereupon be the duty of the party asserting such claim to promptly obtain an adjudication of the rights of the parties. Until such rights are adjudicated, the corporation shall not be compelled to issue a new certificate for such shares of stock until the old certificate is surrendered to it."

It further appears from the foregoing that the validity of said statute was first drawn in question by appellant at the first opportunity in the Circuit Court of the City of St. Louis, and has thereafter been drawn in question at each subsequent stage of the proceedings in this case. Accordingly, it is clear that under the provisions of Section 237 (a) of the Judicial Code, as amended, the Supreme Court of the United States has jurisdiction to review upon appeal said final judgment of the Supreme Court of Missouri.

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The cases which appellant believes sustain such jurisdiction are the following:

Bryant v. *Zimmerman*, 278 U. S. 63, 67;
Herndon v. *Georgia*, 295 U. S. 441, 443-444;
Saltonstall v. *Saltonstall*, 276 U. S. 260, 267-268;
Cissna v. *Tennessee*, 246 U. S. 289, 293-294;
Missouri v. *Gehner*, 281 U. S. 313, 320;
Green Bay, etc. Canal Co. v. *Patten Paper Co.*, 172 U. S. 58, 67-68;
Miedreich v. *Lauenstein*, 232 U. S. 236, 242-243;
Chicago, R. I. & P. Ry. Co. v. *Perry*, 259 U. S. 548, 551.

VI

The Grounds upon Which It Is Contended the Questions Involved in the Appeal Here Sought Are Substantial

As appears from the record in this case, appellant contended before the Circuit Court of the City of St. Louis, the trial court, and throughout the Missouri Supreme Court, that the seizure by attachment authorized by the Uniform Stock Transfer Act of Missouri is insufficient to confer jurisdiction on the court issuing the attachment, and that the purported seizure is a violation of appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Uniform Stock Transfer Act, as recommended by the Commissioners on Uniform State Laws, with more or less modifications, has been enacted in every State in the Union, in the District of Columbia, the territory of Alaska and Hawaii. (Uniform Laws Annotated, Vol. 6, 1947 Cumulative Annal Pocket Part, page 6, Edward Thompson Company.)

The aggregated effect of all these uniform laws regulate and prescribe the transfer, whether voluntary or by operation of law of shares of stock issued by practically all cor-

porations organized under the laws of all the States. The capital invested in such shares embraces a large portion of the national wealth. The Statistical Abstract of the United States, 1946, shows the total transfers of stocks and bonds during the year 1945. Table 484, page 445, states that during 1945, on all the registered exchanges there were sold 767 million shares having an aggregate market value of 16 billion dollars.

The Uniform Stock Transfer Act (at least in respect of the issue here involved) has not been construed by the Supreme Court of the United States.

The attachment provision of the Act as enacted by Missouri is singular, if not unprecedented, in providing that the attachment debtor is free to transfer the certificate representing the shares to an innocent purchaser for value without notice of the attachment. And if such transfer be established before the trial court prior to sale of the shares under execution, that shall stay the execution and put an end to the attachment. Does not this provision eviscerate the jurisdictional effect of the seizure?

In *Tilton* v. *Cofield*, 93 U. S. 163, 168, it was held that the defendant who purchased property subject to an attachment was bound by the subsequent judgment. "The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever it may be, as if he had been a party to the suit from the outset."

The Missouri Legislature has written this "law" out of the statute in question; it has conferred upon the attachment defendant and an innocent purchaser of the certificate the legal right to intermeddle with the attached property and frustrate the attachment.

It has long been settled that one who knowingly interferes with property in the custody of the court is guilty of contempt. *Lamb* v. *Cramer*, 285 U. S. 217, 219.

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In *Clay* v. *Walters*, 178 Fed. 385, 391, the Circuit Court of Appeals said:

> "A party to a suit, who knowingly and intentionally disposes of its subject-matter with intent to withdraw it from the jurisdiction of the court and to render futile any future decree concerning it, unavoidably defies the power and affronts the dignity of the court and thereby renders himself liable to punishment for contempt."

The Missouri Legislature has written that law out of the statute in question; it has conferred upon the attachment defendant the legal right to dispose of the subject matter with intent to withdraw it from the jurisdiction of the court and "stay" the attachment, and this without being in contempt or subject to being censored or criticized.

While no equivalent statutory provision has been construed by this court, the court has stated and expounded the seizure requisites to confer jurisdiction.

In *Cooper* v. *Reynolds*, 10 Wall. 308, 317, it is said:

> "So also while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and *which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court.*" (Emphasis added.)

The Missouri Legislature by the statute in question has placed the uncontrolled dominion of the attached property with the attachment defendant, at least until the date of sale under execution.

Tyler v. *Defrees*, 11 Wall. 331, 349, involved the validity of the sale of property under execution pursuant to a seizure by the United States Marshal. There was a contention that the seizure was not such as to confer jurisdiction on

the Supreme Court of the District of Columbia. In disallowing the contention, the court said:

> "When, therefore, the officer, as in this case, had seized the property for condemnation, and had made known that fact to the court, it was quite certain that it would be within reach of its process when condemned for sale, and when it became necessary to put the purchaser in possession of it. No change of title or possession could be made, pending the judicial proceedings, which would defeat the final decree. The seizure was, therefore, in our judgment, sufficient to subject the land to the jurisdiction of the court."

The Missouri Legislature by the statute in question has subverted the above quoted requisites of jurisdiction by seizure. Under the provisions of the Missouri Act, there is not and cannot be a certainty that the shares will be in reach of the court's process for purposes of sale under execution. The Act contemplates and authorizes a change of title and possession pending the attachment proceedings that will preclude any final judgment against the attachment debtor.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 728, the court had to do with a sale of property of a non-resident under execution entered on a judgment without a previous seizure of the property. The court said that the jurisdiction of the trial court to inquire into and determine the non-resident's obligations at all is only incidental to its jurisdiction over the property.

> "Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the posi-

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tion assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; *the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.*" (Emphasis added.)

The Missouri Legislature by the statute in question has ordained the aforesaid "new element of uncertainty in judicial proceedings." The jurisdiction of the trial court over the seized property is necessarily "made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment."

The sale under execution cannot take place until ten days after the judgment. (Missouri Revised Statutes, 1939, Section 1352.) If before that day the certificate has been transferred to an innocent purchaser for value without notice of the attachment, and that fact appears of record, the attachment is ended and the judgment is void. The fact of jurisdiction cannot exist before the court renders judgment.

From the foregoing it appears that there is presented a novel and far-reaching question as to the jurisdiction of the State Court over shares of stock held by non-residents. The anomalous assumption of jurisdiction over the shares by attachment as shown on the record presents a question under the due process clause of the Fourteenth Amendment. While such method of asserting jurisdiction is at this time singular to the State of Missouri, yet it is made an integral part of the Uniform Act as enacted by Missouri. The declared purpose of the model Act as recommended by the

Commissioners is to make the legal transfer of shares, whether voluntary or involuntary, uniform throughout all the states.

The effect of this Court's disposition of the issue here presented will be to define the requisites for acquiring jurisdiction by seizure in all versions of the Uniform Act now or hereafter enacted, in Missouri as well as throughout the States of the Union. The question presented is one of public importance.

VII

Time of Raising Federal Question

The Federal question was raised in the Circuit Court, which is the court of first instance, by a motion to quash the Sheriff's return to the writ of attachment filed before the return day of process served on the appellant. In the Supreme Court of Missouri said Federal question was raised (a) in appellant's application for a writ of prohibition, (b) in appellant's statement of Points and Authorities as required by Rules of Supreme Court of Missouri, and (c) by appellant's petition for a rehearing. The Supreme Court of Missouri overruled appellant's contention and sustained the validity of said State statute against the objection that it contravened the due process clause of the Fourteenth Amendment to the Constitution of the United States.

It is therefore respectfully submitted that this court has jurisdiction of this appeal under Section 237 (a) of the Judicial Code of the United States.

Respectfully submitted,

FRANK Y. GLADNEY,
J. C. JONES,
ROLAND F. O'BRYEN,
FRED L. WILLIAMS,
Counsel for Appellant.

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APPENDIX "A"

Missouri Laws 1943, pp. 495 et seq.

Corporations: Regulating the endorsement, transfer and delivery of shares of stock in corporations, etc.

An Act to Regulate the Endorsement, Transfer and Delivery of Shares of Stock in Corporations, providing for the method of transferring title to shares, who may deliver certificates of stock, the method of endorsing certificates and the validity thereof, providing for rescission of transfer of shares of stock, prescribing warranties in conection with stock transfers, prescribing requirements for the validity of attachment or liens upon shares of stock and creditors remedies in relation thereto, providing for the issuance of lost or destroyed certificates of stock pursuant to order of court, and defining the terms herein contained.

Section

1. How title to certificate and to shares represented thereby can be transferred.

2. Act does not enlarge powers of infant or other person lacking full legal capacity.

3. Corporation not forbidden to recognize exclusive right of share owners to receive dividends—liability for calls and assessments.

4. Transfer of certificates.

5. Delivery of certificate to transfer title—when effectual.

6. Endorsement of certificate by owner—when effectual.

7. Certificate may be reclaimed, when.

8. Transfer of certificate after previous transfer has been set aside.

9. Delivery of certificate without endorsement obligates owner to make endorsement.

10. Transfer of title without delivery of certificate has effect of promise to deliver.

11. What warranted by a transfer.

12. Mortgagee, pledgee or other holder of certificate for security shall not be deemed to warrant its genuineness.

13. Attachment or execution against shares of stock shall be valid, when.

14. Creditor shall be entitled to aid from courts in attaching certificates.

15. Shall be no lien in favor of a corporation upon shares represented by certificate, etc., unless right stated upon certificate.

16. Alteration shall not deprive owner of his title.

17. Conditions upon which new certificate may be issued in case of loss or destruction.

18. Laws governing in cases not provided for by this Act.

19. Interpretation and construction of Act.

20. When certificate is endorsed.

21. Ownership of certificate.

22. Definitions.

23. When provisions of the transfer act shall apply.

24. Repealing all inconsistent acts or parts thereof.

25. Designation of Act.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. How title to certificate and to shares represented thereby can be transferred.—Title to a certificate and to the shares represented thereby can be transferred only,

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares

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represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person, or

(c) By delivery of the certificate with an assignment endorsed thereon or in a separate instrument signed by the trustee in bankruptcy, receiver, guardian, executor, administrator or other person duly authorized by law to transfer the certificate on behalf of the person appearing by the certificate to be the owner of the shares represented thereby.

The provisions of this section shall be applicable although the charter of articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

Section 2. Act does not enlarge powers of infant or other person lacking full legal capacity.—Nothing in this act shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make valid endorsement, assignment or power of attorney.

Section 3. Corporation not forbidden to recognize exclusive right of share owners to receive dividends—liability for calls and assessments.—Nothing in this act shall be construed as forbidding a corporation:

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares.

Section 4. Transfer of certificates.—The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in

good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the endorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document.

Section 5. Delivery of certificate to transfer title—when effectual.—The delivery of a certificate to transfer title in accordance with the provisions of section 1, is effectual, except as provided in section 7, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.

Section 6. Endorsement of certificate by owner—when effectual.—The endorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in section 7, though the endorser or transferor,

(a) was induced by fraud, duress or mistake, to make the endorsement or delivery, or

(b) has revoked the delivery of the certificate or the authority given by the endorsement or delivery of the certificate, or

(c) has died or become legally incapacitated after the endorsement, whether before or after the delivery of the certificate, or

(d) has received no consideration.

Section 7. Certificate may be reclaimed, when.—If the endorsement or delivery of a certificate,

(a) was procured by fraud or duress, or

(b) was made under such mistake as to make the endorsement or deliver [sic] inequitable; or

If the delivery of a certificate was made

(c) without authority from the owner, or

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(d) after the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or

(2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it.

Section 8. Transfer of certificate after previous transfer has been set aside.—Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.

Section 9. Delivery of certificate without endorsement obligates owner to make endorsement.—The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares, shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Section 10. Transfer of title without delivery of certificate has effect of promise to deliver.—An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.

Section 11. What warranted by a transfer.—A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants—

(a) That the certificate is genuine,

(b) That he has a legal right to transfer it, and

(c) That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim.

Section 12. Mortgagee, pledgee or other holder of certificate for security shall not be deemd to warrant its genuineness.—A mortgagee, pledgee, or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby.

Section 13. Attachment or execution against shares of stock shall be valid, when.—In addition to the remedies provided by Sections 1345 and 1346 and related sections of the Revised Statutes of Missouri 1939 providing for attachment or execution upon shares of stock, attachment or execution against shares of stock for which a certificate is outstanding shall be valid when such certificate is actually seized by the officer levying the attachment or execution against other personal property; *provided,* that a levy of attachment or execution resulting in actual seizure of such certificate shall take precedence over all other remedies

provided by law when made at substantially the same time as such other levy, and prompt notice thereof given to the corporation issuing such shares. In case of levy under said Sections 1345 and 1346 of the Revised Statutes of Missouri 1939, the innocent holder for value and without notice of any certificate of shares of stock subject to such levy may, in addition to the assertion of claim as now provided for under Section 1348 of said statutes, notify the corporation issuing such shares that he has acquired rights to the certificate therefor, and in the event that such notice shall be so given prior to actual sale of said shares of stock under execution, it shall be the duty of the corporation to forthwith notify the officer making the levy or attachment, of the assertion of such adverse claim and such notice to such officer shall act as a stay of further proceedings in connection with such attachment or levy, and it shall thereupon be the duty of the party asserting such claim to promptly obtain an adjudication of the rights of the parties. Until such rights are adjudicated the corporation shall not be compelled to issue a new certificate for such shares of stock until the old certificate is surrendered to it.

Section 14. Creditor shall be entitled to aid from courts in attaching certificates.—A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Section 15. Shall be no lien in favor of a corporation upon shares represented by certificate, etc., unless right stated upon certificate.—There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-laws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate.

Section 16. Alteration shall not deprive owner of his title.—The alteration of a certificate, whether fraudulent or

not and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby.

Section 17. Conditions upon which new certificate may be issued in case of loss or destruction.—where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

The issue of a new certificate under an order of the court as provided in this section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate.

Section 18. Laws governing in cases not provided for by this Act.—In any case not provided for by this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators, and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

Section 19. Interpretation and construction of Act.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

Section 20. When certificate is endorsed.—A certificate is endorsed when an assignment or a power of attorney to

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sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby or when the signature of such person is written without more upon the back of the certificate. In any of such cases a certificate is indorsed though it has not been delivered.

Section 21. Ownership of certificate.—The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect.

Section 22. Definitions.—(1) In this act, unless the context or subject matter otherwise requires—

"Certificate" means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"State" includes state, territory, district and insular possession of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation,

whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.

Section 23. When provisions of the transfer act shall apply. The provisions of the transfer act shall apply to certificates for shares whether issued before or after the taking effect of the transfer act, and also, so far as applicable, to voting trust certificates and stock purchase or subscription warrants which shall be transferable in the same manner and with the same effect as certificates for shares, but said act shall not apply to certificates or shares of mutual savings and loan associations.

Section 24. Repealing all inconsistent acts or parts thereof. All acts or parts of acts inconsistent with this act are hereby repealed.

Section 25. Designation of Act.—This act may be cited as the Uniform Stock Transfer Act.

Approved August 5, 1943.

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APPENDIX "B"

IN THE SUPREME COURT OF MISSOURI

September Session 1947

STATE OF MISSOURI—Set.:

Be It Remembered that on the 12th day of April, 1948, in the Supreme Court of the State of Missouri, among other proceedings had and entered of record and found in Book B-14, Page 239, is the following, to-wit:

Nos. 40643, 40644, 40645

Prohibition

STATE OF MISSOURI, at the Relation of North American Company, a Corporation, Relator,

vs.

WILLIAM K. KOERNER, Judge of the Circuit Court of the City of St. Louis, Respondent

Now at this day, come again the parties, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the preliminary rules in prohibition heretofore issued herein be, and the same are hereby discharged; and that the said respondent recover against the said relator his costs and charges herein expended and have therefor execution. (Opinion filed.)

And thereafter, and on the twenty-third day of April, 1948, the following proceedings were had and entered of record in said cause, to-wit:

Nos. 40643, 40644, 40645

STATE ex rel. NORTH AMERICAN COMPANY, Relator

vs.

WILLIAM K. KOERNER, Judge, Respondent

Comes now the relator, by attorney, and files herein a motion for rehearing and suggestions in support, with service, in the above entitled cause.

And thereafter, and on the twenty-seventh of May, 1948, the following proceedings were had and entered of record in said cause, to-wit:

Nos. 40643, 40644, 40645

STATE ex rel. NORTH AMERICAN COMPANY, Relator,

vs.

WILLIAM K. KOERNER, Judge, Respondent

Now at this day, the court having seen and fully considered relator's motion for a rehearing in the above entitled causes, doth order that said motion be, and the same is hereby overruled.

STATE OF MISSOURI,
County of Cole, ss:

I, Marion Spicer, Clerk of the Supreme Court of Missouri, hereby certify the foregoing is a full, true and correct copy of the judgment, order of filing of motion for rehearing, and order overruling said motion for rehearing, in the above-entitled case, as same appears of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the Seal of the Supreme Court of Missouri at my office in the City of Jefferson City, State aforesaid, this 24th day of July, 1948.

MARION SPICER,
Clerk of the Supreme Court of Missouri.

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APPENDIX "C"

IN THE SUPREME COURT OF MISSOURI

Nos. 40643, 40644, 40645

Consolidated

NORTH AMERICAN COMPANY, a Corporation, Appellant,

vs.

WILLIAM K. KOERNER, Judge of the Circuit Court of the City of St. Louis, Appellee

Petition for Appeal

To the Chief Justice of the Supreme Court of Missouri:

The North American Company, a corporation, which is defendant in the above entitled cause, prays that it may be permitted to take an appeal from the judgment entered in the above cause on the 27th day of May, 1948, to the Supreme Court of the United States for the reasons specified in the Assignment of Errors hereinafter set forth.

And the said defendant, appellant, assigns the following errors in the record and proceedings in said cause:

Assignment of Errors

1. The Court erred in failing and refusing to hold that Section 13 of the Missouri Uniform Stock Transfer Act (Laws of Missouri 1943), as construed and applied in this case, is unconstitutional in that it deprives appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Court erred in holding that the Circuit Court acquired jurisdiction over the appellant and over appellant's property by reason of the attempted attachment of the corporate shares of stock, notwithstanding that under the Court's construction of the Missouri Uniform Stock Transfer Act the sale and transfer of said shares of stock, after

said attempted levy of attachment and before sale under execution, could not be prevented by said attachment.

3. The Court erred in holding that the attempted attachment under said Section 13 was valid, although the Court was without power to control or maintain the status quo of ownership of said attached shares or prevent the transfer theeof *pendente lite.*

And your petitioner desires that said appeal shall operate as a supersedeas, and therefore prays that an order be made fixing the amount of security which said North American Company shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the Supreme Court of the United States.

Dated August 5th, 1948.

FRANK Y. GLADNEY,
J. C. JONES,
ROLAND F. O'BRAGEN,
FRED L. WILLIAMS,
Attorneys for North American Company.

And now, to wit, on the 5th day of August, 1948, upon the presentation and consideration of the foregoing petition for appeal it is

Ordered that said appeal be allowed and that such appeal operate as a supersedeas as prayed for, upon appellant, North American Company, giving bond as required by law in the sum of $1,000, and that bond for said sum submitted by appellant with said petition be and the same is in all respects approved.

Dated this 5th day of August, 1948.

____ ____,
Chief Justice of the Supreme Court of Missouri.

STATE OF MISSOURI,
County of Cole, sct.:

I, Marion Spicer, Clerk of the Supreme Court of Missouri, hereby certify the foregoing is a full, true and correct copy of the petition for appeal, assignment of errors

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and order allowing same, in the cases of North American Company vs. William K. Koerner, Judge, Nos. 40643, 40644 and 40645, as same remain on file in my office.

In Testimony Whereof I hereunto set my hand and affix the Seal of the Supreme Court of Missouri at my office in the City of Jefferson City, State aforesaid, this 5th day of August, 1948.

MARION SPICER,
Clerk of the Supreme Court of Missouri.

[SEAL]

APPENDIX "D"

IN THE SUPREME COURT OF MISSOURI

En Banc—January Session, 1948

Nos. 40643, 40644, 40645

Prohibition

STATE ex rel. NORTH AMERICAN COMPANY, a Corporation, Relator,

vs.

HONORABLE WILLIAM K. KOERNER, Judge of the Circuit Court, City of St. Louis, Missouri, Respondent

The North American Company, a New Jersey corporation, the relator in these prohibition proceedings, is seeking a determination of the question whether the long existing section of our statutes permitting the attachment of shares of stock in a Missouri corporation by serving the writ on an official of the corporation at the office of the corporation was rendered ineffective by the adoption in 1943 of the Uniform Stock Transfer Act. (Laws 1943, pp. 495-502, Sec. 5563.1-Sec. 5563.24 Mo. RSA.)

Relator's theory is that the Uniform Stock Transfer Act has changed the old doctrine that a certificate of stock is merely evidence of the holder's property interest in the corporation with its situs in the state of the corporation's

domicile, and that under the act the entire property interest is now embodied in the certificate, like a bearer bond for instance, so that the situs of the holder's property interest is necessarily the same as the situs of the certificate. We issued writs of prohibition to determine the question as it bears directly on the jurisdiction of the Circuit Court of the City of St. Louis over relator, a non-resident corporation, as defendant in three cases pending there where jurisdiction was obtained by attaching relator's stock in the Union Electric Company, a Missouri corporation with its principal office in the City of St. Louis.

The question arises under these circumstances. One Frank J. Boehm as plaintiff, filed three actions in the Circuit Court of the City of St. Louis against relator and others, in which he alleged a conspiracy to defame, libel and slander, and he also alleged malicious prosecution. He seeks damages aggregating $24,500,000. Relator, as we said, is a New Jersey corporation, having its principal office in New York City. Boehm sought to obtain jurisdiction over relator in each of the three actions by attaching relator's shares of stock in the Union Electric Company by serving writs on the secretary of the Union Electric Company at its office in St. Louis as provided by statute.

The attachment levies followed the procedure prescribed by Sections 1345, 1346, and 1457, R. S. 1939, Mo. RSA which authorize such an attachment at the office of the corporation without actual seizure of the stock certificates themselves. The certificates which have been issued to relator are presumably in a vault in New York City but, at any rate, were not seized by the sheriff.

Relator, making special appearances, moved to quash the sheriff's returns. The grounds stated in the motions are lengthy, but may be resolved into the single issue whether the stock had a situs in Missouri so that jurisdiction of the circuit court could be obtained by attachment without violating relator's right to due process under the Fourteenth Amendment. In substance, relator argues that since the adoption of the Uniform Stock Transfer Act in this state stock certificates of themselves constitute the shares of stock and embody the holder's whole property interest in the corporation, and are tangible, negotiable instruments

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having a situs only in the jurisdiction where the stock certificates are actually located. Therefore, relator concludes the statutes under which the attachments were made have been either repealed by the Transfer Act or have become ineffective because such shares no longer have a situs in Missouri which could subject them to attachment here.

When the trial judge overruled the motions to quash in each of the three actions, three separate prohibition proceedings were instituted in this court and have been consolidated for the purpose of argument and opinion.

Prior to the enactment of the Transfer Act, it was well settled in Missouri and elsewhere that the situs of shares of stock is in the state which is the domicile of the corporation, regardless of where the stock certificates may be located.

In 7 CJS, Attachment, Section 92(b), the general rule is stated: "It seems to be well settled that, for purposes of attachment, the situs of shares of stock is within the state where the corporation resides, and that they may lawfully be levied on in such state. Accordingly, the stock of a domestic corporation is subject to attachment in the state of its domicile, although it is owned by a nonresident, and although the certificate of stock is in the possession of a debtor outside of the state."

Section 1457 authorizing attachment of shares of stock has been in force in this state since 1860. Laws 1859, p. 3. In Armour Brothers Banking Company v. St. Louis National Bank, 113 Mo. 12, 20 S. W. 690, where it was held that stock certificates issued by a New York corporation could not be attached in Missouri under the same attachment statutes here involved, but such statutes applied to Missouri corporations alone, the opinion states that "* * * certificates of stock are not the stock itself—they are but evidence of the stock; * * *" and quotes with approval from Cook on Corporations, Section 485: "Shares of stock in a corporation are personal property whose location is in that state where the corporation is created. * * * Considered as property separated from its owner, stock is in existence only in the state of the corporation."

In Richardson v. Busch, 198 Mo. 174, 95 S. W. 894 the public administrator of the City of St. Louis was held not entitled to administer upon stock certificates of a New York corporation which had been owned by a New York decedent but which were located in St. Louis, since the situs of the stock was in New York. The opinion quotes with approval from Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 44 L. Ed. 647, where the Supreme Court of the United States upheld the jurisdiction of the Federal Circuit Court for the Western District of Michigan over stock in a Michigan corporation, although the owners of the stock and the holders of the certificates lived in Massachusetts, stating: "The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner." And see the comment on the latter opinion by Judge Learned Hand in Direction Der Disconto-Gesellschaft v. U. S. Steel Corporation, 300 F. 741.

Relator, while conceding that the situs of the shares of stock was in Missouri prior to the adoption of the Transfer Act, contends that the nature of the property in shares of stock has been entirely changed by the Transfer Act; that the shares of stock are the certificate itself and have become tangible personal property; that stock certificates are negotiable instruments with a situs no longer at the domicile of the corporation but having a situs solely where the certificates themselves are located; that even though the Transfer Act expressly retains the right to attach under the old statutes, this provision of the act is so much in conflict with the remainder of the act that it must be disregarded.

On the contrary we agree with the views of the learned trial judge who in upholding the attachment in the three cases filed a memorandum opinion which states in part as follows: "The act of 1943 does not change the substantive law with reference to the relationship between cor-

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poration and stockholder. It is still a contractual and trust relationship, an intangible; the certificate merely evidences it. This 1943 act purports to regulate the 'endorsement, transfer and delivery of shares of stock in corporations'; and it does just that, nothing more. If it were to be construed to alter the pre-existing property rights of the stockholders it might be challenged on constitutional grounds. So far as this Court can discern, neither expressly nor by implication does the act do more than provide how stock may be transferred, both voluntarily and by legal procedure, and one of the methods which may legally be followed is set forth in Section 13 (of the Act) reaffirming Sections 1345 and 1346, R. S. Mo. 1939."

Section 13 of the proposed model Uniform Stock Transfer Act as recommended for adoption by the various states contains a provision requiring actual seizure of stock certificates as the method of attachment of shares of stock. That section provided in part: "No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actully seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined • • • " The original bill embodying the Transfer Act as introduced in the legislature contained this section as set out, but through a Senate Committee Amendment Section 13 was entirely rewritten. Section 13 of the act as finally adopted commences as follows: "In addition to the remedies provided by Section 1345 and 1346 and related sections of the Revised Statutes of Missouri 1939 providing for attachment or execution upon shares of stock • • • " The section then goes on to authorize seizure of the stock certificate as an additional method of attachment, and contains lengthy provisions for adjusting disputed title claims and staying one proceeding where there have been attachments by both methods.

It is clear the legislature intended to preserve the former attachment jurisdiction of Missouri courts over shares of stock even though the sheriff did not or could not actually seize possession of the stock certificates, and to continue to permit title to stock to be transferred through judicial proceedings pursuant to such attachment. But relator as-

serts that this provision of Section 13 of the act is inconsistent with Section 1 which recites "Title to a certificate and to the shares represented thereby, can be transferred only * * *", and then follow three sub-paragraphs each of which involves actual delivery of the stock certificate. While Section 13 when considered separately is in conflict with the attempt to make the methods of transfer set out in Section 1 exclusive, still when the two sections are read together the attachment procedure retained under Section 13 becomes an exception to Section 1, and they become harmonious. It might have been better draftsmanship if in rewriting Section 13 an amendment had been added to Section 1 by having it commence with the words "Except as hereinafter provided in Section 13." But the intent of Section 13 is so clear that it must be held that attachment proceedings under the prior statutes were intended to constitute an additional method to those set out in Section 1 whereby shares of stock might be transferred.

Relator's brief discusses various paragraphs of the act which it contends converts a certificate of stock into a negotiable instrument embodying the complete property interest of the holder, and subject to the same rules as to situs that would be applicable under the Negotiable Instruments Act. The Transfer Act nowhere states that stock certificates shall be considered as negotiable instruments. Clearly a stock certificate cannot comply with at least two requirements of the definition of a negotiable instrument contained in Section 3017 R. S. 1939, Mo. RSA, namely, the instrument "must contain an unconditional promise or order to pay a sum certain in money," and "must be payable on demand, or at a fixed and determinable future time." While the Transfer Act gives the stock certificate some elements of negotiability, it does not constitute the certificate a negotiable instrument within the meaning of the Negotiable Instruments Act.

There are some cases where stock certificates under the Uniform Stock Transfer Act have been held negotiable instruments. See: Turnbull v. Longacre Bank, 249 N. Y. 159, 163 N. E. 135; Edmund Wright-Ginsberg Co. v. Ribbon Mills (N. J.) 148 Atl. 178; Priess v. Terrazzo Co., 309 Ill. App. 475, 33 N. E. (2d) 504. We may assume without

deciding that in the broad sense of the word, stock certificates under the Transfer Act as adopted in Missouri may be regarded as a type of instrument which is negotiable. But that does not mean that decisions applying to instruments coming within the scope of the Negotiable Instruments Act must also be applied to stock certificates. There is a substantial difference in the nature of the instruments. Checks, notes, drafts, and bills of exchange are intimately tied in with the monetary system of the country. Notes and other commercial paper are rediscounted by the Federal Reserve Banks in exchange for Federal Reserve notes which swell the monetary supply of the Nation. A large majority of all the obligations payable in money are discharged through a check or other form of commercial paper and not through the payment of currency. Such commercial paper freely passes from hand to hand as the equivalent of money and it is suitable that the law should give it a situs similar to that of currency. Another type of negotiable instrument, a bearer bond, freely changes hands like an ordinary chattel without even the formality of an endorsement, and may appropriately have a situs like that of a chattel.

However, a stock certificate has for many years been recognized as a different type of instrument. It is the tangible evidence of title to a unique type of intangible property having a situs at the domicile of the corporation. The legislature by passing the Transfer Act has made a stock certificate more freely transferable without changing the nature of the property right of the stockholder and without changing the situs of the property. This it had the right to do. The stock certificate remains a title document, not the property itself.

The title of the act as adopted, is as follows: "An Act to Regulate the Endorsement, Transfer and Delivery of Shares of Stock in Corporations, providing for the method of transferring title to shares, who may deliver certificates of stock, the method of endorsing certificates and the validity thereof, providing for rescission of transfer of shares of stock, prescribing warranties in connection with stock transfers, prescribing requirements for the validity of attachment or liens upon shares of stock and creditors

remedies in relation thereto, providing for the issuance of lost or destroyed certificates of stock pursuant to order of court, and defining the terms herein contained." This title says nothing about changing the nature of property rights in stock or changing the situs of shares of stock. It is consistent with the opening part of Section 13 which evidences the intent of the legislature to retain the situs of shares of stock in Missouri.

There are other sections of the act which indicate a fundamental distinction between stock certificates and commercial paper. Section 3, for example, permits a corporation to treat the stockholder registered on its books as the owner of the shares for the purpose of the right to vote and to receive dividends, and for the purpose of imposing liability for calls and assessments, even though the stock certificate may have changed hands through endorsement and delivery.

Sections 3070 and 3072 R. S. 1939, Mo. RSA protect the holder in due course of commercial paper even though a prior negotiation of the instrument has been obtained by "fraud, duress or force and fear, or unlawful means, or for an illegal consideration, or when the prior negotiation is in breach of faith or under circumstances amounting to a fraud." Section 7 of the Transfer Act protects an innocent purchaser for value where the endorsement or delivery of the certificate was procured by fraud or duress, or was made under such mistake as to make the endorsement or delivery inequitable, or if the delivery was made without authority from the owner, or after the owner's death or legal incapacity. But it does not give protection, as in the case of negotiable instruments, when a negotiation has been obtained by force and fear, or by other unlawful means, or for an illegal consideration. Assuming, but not deciding, that the stock certificate under the Transfer Act is, in a broad sense, a negotiable instrument, we think it sufficient for the decision of this case merely to say that such instrument is freely transferable evidence-of-title to shares of stock whose situs remains unchanged at the domicile of the corporation. We think the legislature could retain such situs in Missouri under Section 13 without nullifying the rest of the act.

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The cases of Haughey v. Haughey, 305 Mich. 356, 9 N. W. 575 and Mills v. Jacobs, 333 Pa. 231, 4 Atl. (2d) 152 hold that under the Uniform Stock Transfer Act the situs of the share is the situs of the certificate. Those decisions might be persuasive if the legislature had not adopted the Transfer Act with a title giving no indication of any change in the nature of the property right or change in the situs, and containing a different Section 13 which clearly evidences the intent of the legislature that the situs shall not be changed. Giving full effect to Section 13 does not destroy the balance of the act, which can be given a useful and substantial scope without changing the situs of the shares.

In two jurisdictions which have adopted the Uniform Stock Transfer Act but have failed to adopt Section 13 as contained in the recommended act, conclusions have been reached which are in accord with our views. In Central Mortgage Company v. Buff, 278 Mass. 233, 179 N. E. 628, an action was brought under a Massachusetts statute which is analogous to the Missouri attachment statutes, and which permitted a debt to a plaintiff to be determined and satisfied out of the defendant's stock interest in a Massachusetts corporation. The opinion states that under the statute it was not necessary to prove that the certificates for the shares of the debtor were in possession of the debtor, and that the provisions of the Uniform Stock Transfer Act, as adopted in that state, did not require a different conclusion. The Massachusetts Transfer Act appears in General Laws of Massachusetts, Chapter 155, Sections 24-44, and does not include Section 13 of the recommended model Uniform Act. In Partch v. Adams, 55 Cal. App. 1, 130 Pac. (2d) 244, California had an attachment statute similar to the Missouri statute and then adopted the Uniform Stock Transfer Act, but without Section 13 of such act. The opinion states that it was not necessary for the sheriff to take possession of the certificates in order to hold a valid sale on attachment of the shares. The principal question involved was which of two attachment sales in two different counties in California passed the superior title.

It appears to us that one of the purposes of the Transfer Act was to provide better protection to a purchaser in good faith of a duly endorsed stock certificate or a certificate accompanied by a properly executed stock power. This purpose is accomplished through a number of provisions contained in the act as adopted one of which, Section 7, has been heretofore discussed. The legislature could thus facilitate the use of a stock certificate as an evidence of title without destroying the situs of the shares in Missouri and the jurisdiction of Missouri courts to attach the shares under the pre-existing attachment statutes. Section 13 although clearly out of harmony with the evident intent of the framers of the model act is not so contradictory as to destroy the remainder of the Transfer Act as adopted by our legislature.

Relator points to certain provisions in the Transfer Act for reciprocity with other states and contends that the statute must fail in its purpose unless it complies with the recommended Uniform Act adopted in other states. It is doubtful whether the act is so uniform in other states as relator contends. We find from the opinions previously cited that at least Massachusetts and California have repudiated Section 13 of the model Uniform Act which limits attachment to actual seizure of the stock certificates. In varying degrees these other states have done the same, Colorado, Florida, Georgia, Kansas, and Montana. And it is clear that our legislature did not intend to adopt all of the provisions as proposed in the model Uniform Act. Several amendments were made, and the title was also amended so as to eliminate the words "and to Make Uniform the Law with Relation Thereto" which had been contained in the title of the bill as originally introduced.

Relator urges that Section 13 of the Transfer Act as adopted creates the possibility of two certificates being outstanding representing the same stock, which would create an unconstitutional fictitious increase in stock in violation of Section 7, Article XI, 1945 Constitution, citing Berry v. Rood, 168 Mo. 316, 67 S. W. 644 construing a similar provision of the 1875 Constitution. We do not agree. Such a situation would be analogous to two conflicting chains of title to a tract of real estate, one perhaps commenced

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by a sheriff's deed. The courts would ultimately have to determine which chain of title is superior. A similar determination would have to be ultimately made as to the conflicting claims of the holders of two different certificates purporting to represent the same shares of stock.

Relator has raised some constitutional points that we do not believe are involved in this case and not properly before us for determination, so we will not discuss them.

Since the circuit court has jurisdiction in the three actions, the preliminary rules in prohibition heretofore issued should be discharged.

It is so ordered.

JAMES M. DOUGLAS,
Judge.

4/12/48.
All concur.

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